As early as the case of *Marbury* v. *Madison*, 1 Cranch 170, Chief Justice MARSHALL said: "It is not by the office of the person to whom the writ is directed, but by the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." Every officer is amenable to the laws, and if the legislature sees fit to impose purely ministerial duties, involving no discretion, upon the chief executive, why should he be immune from their performance? As to such duties it seems that the general principle of allowing relief against ministerial officers should apply, and the mere fact that it is the governor against whom the relief is sought, should not deter the courts from the exercise of their jurisdiction. The authority of the courts is supreme in the determination of all legal questions judicially submitted to them within their jurisdiction, and no one is exempted from the operation of the law. Moreover the duty of faithfully executing the laws is solemnly enjoined upon the governor by his oath of office. If the relief sought were refused, those persons whose rights had been invaded by executive neglect or refusal to act, would very often be altogether without redress. No one desires an unwarrantable encroachment or interference by the courts with acts of the executive within his proper sphere of duty, but, when duties are imposed upon the governor in regard to which he has no discretion and in the execution of which individuals have a direct pecuniary interest, and there is no other adequate remedy, they should have protection and an enforcement of justice.

The danger in the application of the rule lies in the difficulty of distinguishing between so-called political or executive duties, and those which are definitely defined to be performed in some particular manner. That the delicacy of the task presented to the courts might, in a close case, cause them to overstep the limits of their power seems to be the only valid objection of the courts holding this view. Large discretion in determining the character of all acts to be performed by the governor might, it is said, infringe upon the right of that executive to use *his* discretion in determining the same question. But is it to be supposed that the courts, any more than the governor, will overstep the limit of the powers conferred or will exercise an unwarranted jurisdiction? Possibly there would be a tendency that the courts, in determining what is a ministerial duty, might exert a control over the executive department, and might in a way deprive it of its right of discretion. Is this a sufficient reason for giving an absolute immunity to the governor from all control, even in a clear case where the duty is plainly ministerial, and has so been held as regards other executive officers? To the writer it seems not. The legislature could readily obviate all difficulty in the matter by conferring upon the governor only such duties as are *clearly* executive and political in their nature. N. K. F.

WHAT CONSTITUTES AN APPEARANCE IN AN ACTION FOR DIVORCE.—Petition for divorce by a resident of New Jersey. The divorce act of 1907 of that State provides that a defendant is to be brought under the jurisdiction of the court by personal service or if a non-resident by publication. Defendant was a resident of New York. Neither of these methods was employed, but in-

stead defendant's solicitor endorsed an acknowledgment of service on a citation issued to plaintiff's attorney which was returned into court and entered a formal appearance with the clerk of the court and filed an answer. *Held,* the court had no jurisdiction of the person of the defendant and the petition was dismissed. *Henry* v. *Henry* (N. J. Eq. 1912) 82 Atl. 47.

As a general rule jurisdiction may be acquired of the person of a defendant in a civil action by his voluntary appearance in court, either by attorney or in person, and submission to the court's authority; *Meyers* v. *American Locomotive Co.,* 201 N. Y. 163, 94 N. E. 605; *Flint* v. *Comly et al.,* 49 Atl. (Me.) 1044; *Multnomah Lumber Co.* v. *Basket Co.* (Ore.) 99 Pac. 1046; *Mahoney* v. *Middleton,* 41 Cal. 41; *Cal. etc. Lumber Co.* v. *Mogan,* 108 Pac. (Cal.) 882; *Blair* v. *Sennott,* 35 Ill. App. 368; *Sunier* v .*Miller,* 105 Ind. 393; *Freeman* v. *Waynant,* 25 Kan. 279; *Hunt* v. *Ellison,* 32 Ala. 173; *Bowdoin College* v. *Merritt,* 59 Fed. 6; *McCullough* v. *Ry. Ass'n.,* 73 Atl. (Pa.) 1007. But the court in the principal case, though admitting the above to be the general rule, said: "In divorce cases another rule prevails. There the statute must be strictly followed, for the reason that the issue does not alone concern the parties to the cause. It concerns organized society, which is based upon the settled and orderly customs and obligations attendant upon the marriage status. It will not permit that status to be changed or modified except in the manner pointed out by the laws which it has sanctioned. Parties cannot be permitted to become divorced by any sort of consent. The proceeding in all its parts must be strictly adverse and in accordance with the statute."

In *Dodge* v. *Dodge,* 90 N. Y. Supp. 438 and in *Freeman* v. *Freeman,* 110 N. Y. Supp. 686 it was held that appearance by attorney acting under direction of the defendant in divorce proceedings gave the court jurisdiction, though the defendant had not been personally served with summons. In the latter case KELLOG, J., dissenting, conceded the rule, but looked upon a voluntary appearance by the defendant with suspicion, as tending to prove collusion. In Pennsylvania, in an action for divorce, the respondent residing in New Jersey entered an appearance by attorney. It was objected that respondent had not been served and that the proper course of procedure was by publication, but the court held that an appearance cured any defect in the process and that there was no presumption of collusion from such an entry of appearance; *Renz* v. *Renz,* 22 Wkly Notes of Cas. (Pa.) 226. The Pennsylvania court in the later case of *English* v. *English,* 19 Pa. Super. 586, said: "The commonwealth is always the unnamed third party to the (divorce) proceeding. Divorces are granted on public grounds, and not to suit the mere desires of the parties. Hence suspicious circumstances tending to show collusion will be closely scrutinized by the courts. An acceptance of service after it is too late to make a valid service, or an appearance notwithstanding a fatal defect in the service of the writ, or in the publication, it may be conceded is a circumstance suggestive of collusion, which may be taken into consideration in connection with other circumstances in determining that question of fact * * * (but) * * * the public cannot be interested in technical objections, and being always present in court by the judge it cannot be taken by surprise for want of notice," and the court held that the same rules, therefore, may govern as in other causes, and that neither on principle nor on

authority could it be declared as an unvarying rule that an appearance, in the absence of due legal service of the subpoena, is conclusive evidence of collusion.

In Delaware, the case of *Wood* v. *Wood* (1909) 74 Atl. 376, is directly in point as supporting the decision of the principal case. The prior divorce act in Delaware provided that a summons shall issue for the defendant's appearance, *and upon such appearance,* or upon proof of the service of summons, or upon proof of substituted service, the cause shall proceed to trial. The laws of 1907 provide that a summons shall issue for the defendant's appearance, and upon proof of the service of summons or of substituted service the cause shall proceed to trial. The clause in the former act, "and upon such appearance," was omitted. The court held that it was perfectly clear that under the old act there were two means of obtaining jurisdiction, one, by appearance, the other, by proof of service, while the new act prescribed only one method, to-wit, by service, and said: "We think this new act contemplates an adverse proceeding, and the proceedings throughout must be free from taint or color of collusion. * * * The defendant voluntarily comes into court (she appeared by attorney) and attempts to assist by appearance in having the charge that she has violated her marriage vow determined against her as speedily as possible, all of which we think is against the clear intent of the act, and especially against public policy." The court believed the omission of the clause, *supra,* was a sufficient indication of the legislative intent that voluntary appearances should not be allowed in divorce proceedings.

And in the principal case we find that the court rested its decision very largely upon the ground that the legislature must have intended the new divorce act to be mandatory and expressive of a public policy to be strictly enforced. The court held that inasmuch as the act of 1907 prescribed the same procedure in divorce actions as in other cases in chancery *except so far as other process and procedure was prescribed by or under the authority of this act,* and then proceeded to prescribe a method of obtaining jurisdiction, it was clear that a voluntary appearance, as under the old act according to the rules of chancery, was no longer permissible.

The decision of the principal case can hardly be said to be judicial legislation, but it is certainly indicative of the present tendency of the courts and legislatures to tighten up on our divorce laws in response to the continual outcry against them. The mere fact, however, that the pendulum has already swung so far in one direction ought not to be a ground for swinging it too far in the other. L. F. M.

THE QUESTION OF THE VALIDITY OF A STIPULATION FOR ATTORNEY'S FEES UNDER THE NEGOTIABLE INSTRUMENTS LAW.—Does the provision of the Negotiable Instruments Law, that "the sum payable is a sum certain within the meaning of this chapter, although it is to be paid: * * * (5) With costs of collection or an attorney's fee in case payment shall not be made at maturity," give validity to such a stipulation? The question is answered in the negative by a recent case, *Miller* v. *Kyle* (Ohio 1911), 97 N. E. 372.

No other case that has directly passed on the same question has been